No. 92-1053

Supreme Court, U.S.
FILED
FEB 3 1993
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

October Term, 1992

NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"),

Petitioner,

v.

RAN-DAV'S COUNTY KOSHER, INC., ARTHUR AND NADINE WEISMAN, AND NEW JERSEY ALLIANCE OF KOSHER CATERERS,

Respondents,

AND

STATE OF NEW JERSEY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION OF RESPONDENTS RAN-DAV'S COUNTY KOSHER, ARTHUR AND NADINE WEISMAN, NEW JERSEY ALLIANCE OF KOSHER CATERERS

BRIAN STUART KOUKOUTCHOS
Counsel of Record
485 Concord Avenue
Lexington, Massachusetts 02173
(617) 861-6001

ERIC L. CHASE
GENEVIEVE K. LAROBARDIER
HANNOCH WEISMAN
Roseland, New Jersey
Attorneys for Respondent New Jersey Alliance of Kosher Caterers

RONALD K. CHEN
ACLU OF NEW JERSEY
Newark, New Jersey
Of Counsel

February 3, 1993

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. Does this Court have jurisdiction (and does the Petitioner have standing) under Article III to review a decision of a state court striking down state regulations as unconstitutional, where the State itself has declined to seek review and where the sole Petitioner is a private organization of lawyers and social scientists seeking to revive the state regulations in order to further its own abstract social interests?

2. Under the doctrine of *Michigan v. Long*, 463 U.S. 1032 (1983), does this Court have jurisdiction to review a state court decision invalidating state regulations under both the Federal and state Constitutions, where the court expressly invoked state constitutional provisions and decisions and noted that the "state constitutional standard is informed by an understanding of federal constitutional doctrine"?

3. Does a state impermissibly entangle government in sectarian religious disputes when it (a) expressly incorporates into state consumer law the dictates of Orthodox Jewish kosher dietary rules; (b) mandates, on pain of prosecution, that all kosher food establishments adhere to the state's understanding of "strict compliance with the laws and customs of the Orthodox Jewish religion;" (c) appoints a government panel of rabbis to share responsibility for enforcing those laws; and (d) requires its courts to resolve disputes between competing rabbinical interpretations of these religious dietary doctrines?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

STATEMENT OF THE CASE 1

A. The Orthodox Jewish Dietary Laws of Kosher. 1

B. The New Jersey Kosher Enforcement Regime 2

C. This Litigation. 3

D. The Decision of the New Jersey Supreme Court 4

REASONS FOR DENYING THE WRIT

I. PETITIONER HAS NO STANDING UNDER ARTICLE III TO SEEK REVIEW OF THE DECISION BELOW. 9

II. THE DECISION BELOW RESTS ON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND. 14

III. THE PETITION FAILS TO IDENTIFY ANY ISSUE OF FEDERAL LAW ON WHICH THE DECISION BELOW IS IN ERROR OR IN CONFLICT WITH ANY DECISION OF ANY FEDERAL COURT, AND THE ASSERTED "CONFLICT AMONG STATE COURTS" IS NOT ONLY A SHAM BUT IS IN ANY EVENT BEYOND THE JURISDICTION OF THIS COURT. 19

IV. THE PETITIONER OFFERS NO REASON FOR THIS COURT TO RECONSIDER ITS ESTABLISHMENT CLAUSE JURISPRUDENCE, AND THIS CASE WOULD IN ANY EVENT BE AN UNSOUND VEHICLE FOR ANY SUCH UNDERTAKING. 22

CONCLUSION 27

TABLE OF AUTHORITIES

CASES:

Alicea v. New Brunswick Theological Seminary, 244 N.J.Super. 119 (App.Div. 1990), *aff'd on other grounds*, 128 N.J. 303 (1992) 17

ASARCO v. Kadish, 490 U.S. 605 (1989) 16

Barghout v. Mayor & City Council, 325 Md. 311, 600 A.2d 841 (1992) 20

Bender v. Williamsport Area School District, 475 U.S. 534 (1986) 10,11,12

Cabinet v. Shapiro, 17 N.J.Super. 540 (Law Div. 1952) 18

California v. Carney, 471 U.S. 386 (1985) 16

Cedar Cove, Inc. v. Stanzione, 122 N.J. 202 (1991) 16

Chavis v. Rowe, 93 N.J. 108 (1983) 17

Delaware v. Van Ardsall, 475 U.S. 673 (1986) 16

Diamond v. Charles, 476 U.S. 54 (1986) 9,10,11,12,13

Elmora Hebrew Center v. Fishman, 125 N.J. 404 (1991) . . . 17

Employment Division, Dept. of Human Resources v. Smith, 494 U.S. 872 (1990) 25

Erlich v. Municipal Court, 55 Cal.2d 553, 360 P.2d 334 (1961) 21

Everson v. Bd. of Education, 330 U.S. 1 (1947) 21

Harris v. McRae, 455 U.S. 363 (1980) 12,17

TABLE OF AUTHORITIES (cont'd)

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 11

Henry v. Mississippi, 379 U.S. 443 (1965) 14

Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977) 12

Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925) . . . 21

Illinois v. Rodriguez, 497 U.S. 177 (1990) 18

Karcher v. May, 484 U.S. 72 (1987) 10

Korn v. Rabbinical Council of California, 148 Cal.App.3d 491, 195 Cal.Rptr. 910 (Cal.Ct.App. 1983) 21

Lamb's Chapel v. Center Moriches Union Free School District, No. 91-2024 22

Larkin v. Grendel's Den, 459 U.S. 116 (1982) 23,24

Larson v. Valente, 456 U.S. 228 (1982) 23

Lee v. Weisman, 112 S.Ct. 2649 (1992) 7,24,25

Lemon v. Kurtzman, 403 U.S. 602 (1971) 16,17,22,25

Linda R. S. v. Richard D., 410 U.S. 614 (1973) 12

Lujan v. Defenders of Wildlife, 112 S.Ct. 2130 (1992) . 10,11,12

Marsa v. Wernik, 86 N.J. 232, *cert. denied*, 454 U.S. 958 (1981) 15,16

Maryland v. Garrison, 480 U.S. 79 (1987) 16

McGowan v. Maryland, 366 U.S. 420 (1961) 23

TABLE OF AUTHORITIES (cont'd)

Michigan v. Chesternut, 486 U.S. 567 (1988) 18

Michigan v. Long, 463 U.S. 1032 (1983) 14,18

Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) 18

Minnesota v. Nat'l Tea Co., 309 U.S. 551 (1940) 15

Montana v. Hall, 481 U.S. 400 (1987)(per curiam) 16

New York v. P.J. Video, 475 U.S. 868 (1986) 16

Ohio v. Johnson, 467 U.S. 493 (1984) 16

Oliver v. United States, 466 U.S. 170 (1984) 18

Pennsylvania v. Muniz, 496 U.S. 582 (1990) 16

Peper v. Princeton University, 77 N.J. 55 (1976) 16

Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969) 23

Resnik v. E. Brunswick Tp. Bd. of Educ., 77 N.J. 88 (1978) 15

Right to Choose v. Byrne, 91 N.J. 287 (1982) 10,17

Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) 23

Sossin Systems, Inc. v. City of Miami Beach, 262 So.2d 28 (Fla.Dist.Ct.App. 1972) 21

Tudor v. Bd. of Educ., 14 N.J. 31 (1953) 16

United Kosher Butchers Ass'n v. Assoc. Synagogues of Greater Boston, 349 Mass. 595, 211 N.E.2d 332 (1965) . . 21

TABLE OF AUTHORITIES (cont'd)

United States v. Providence Journal Co.,
485 U.S. 693 (1988) 9, 13

Zobrest v. Catalina Foothills School District, No. 92-94 22

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS:

U.S. Const., Amend. I, Establishment Clause 15,17,18

N.J. Const., Art.I, ¶ 4 14,15,17

N.J.S.A. § 2C:21-7.4 3
§ 56:8-8 3
§ 56:8-13 3

N.J. ADMIN. CODE § 13:45A-21.1 2
§ 13:45A-21.2(a) 2

MISCELLANEOUS:

S. Himelstein, THE JEWISH PRIMER: QUESTIONS AND ANSWERS ON JEWISH FAITH AND CULTURE (1990) 1

KASHRUS MAGAZINE, Sept., 1990 2

Justice O'Connor, *Our Judicial Federalism*,
35 CASE WES. L. REV. 1 (1984) 14

STATEMENT OF THE CASE

At issue in this case is an attempt by a religious organization of lawyers and social advocates to resurrect a controversy over state regulations that were invalidated under both the State and Federal Constitutions. The State itself has abandoned the invalidated regulations, is about to publish substitute regulations, and has not petitioned this Court for review of the state court decision below.

A. The Orthodox Jewish Dietary Laws of Kosher.

The word "kosher" comes from the Hebrew *kasher* and means "ritually correct." (5a).[1] It refers to the Jewish dietary laws that guide the practice of *kashrut* — a practice one follows to attain *kedusha* or "holiness." (5a). These religious dietary laws have been developed through several thousand years of Talmudic debates and rulings by rabbinical scholars as to what animals one may eat, how the animals must be slaughtered, and how the meat products must be prepared and served. The kosher laws are meant to make food ritually correct, not more healthful. "The classical Jewish commentators agree that the laws concerning kosher and non-kosher food do not have any rational basis *that a human being can understand*. Their purpose, so we are told, is to show the Jew's obedience to God as God, even where the human intellect cannot comprehend why He decreed any specific law." S. Himelstein, THE JEWISH PRIMER: QUESTIONS AND ANSWERS ON JEWISH FAITH AND CULTURE 185 (1990)(emphasis in original).

As the New Jersey Supreme Court recognized, "[t]he laws of *kashrut* are complex and exacting." (5a). "Central to the doctrine of *kashrut* is the requirement of the *mashgiach*, the religious authority who must supervise kosher butchers and certify compliance with the laws of *kashrut*." (5a). Relying in part on authorities provided by Petitioner COLPA itself, the New Jersey Supreme Court found that

---

[1] References to the appendix bound with the Petition, which contains the decision below, will be styled "__a." References to the appendices submitted by respondents to the New Jersey Supreme Court will be styled "N.J.S.Ct. App., Vol. __ at __." References to the appendices as they appeared before the Appellate Division of the Superior Court will be styled "App.Div.App. at ___." References to the Petition for Certiorari will be styled "Pet. at ___. References to the Brief of Respondent New Jersey will be styled "N.J. Br. at __."

"there is considerable disagreement over what precepts or tenets truly represent the laws of *kashrut*. There are differences of opinion concerning the application and interpretation of the laws of *kashrut* [even] within Orthodox Judaism." (6a). *See also* 20a-21a.[2] Moreover, the court below also found that "[d]isputes constantly arise within Orthodox Judaism over the legitimacy of the various religious authorities purporting to ensure that food is kosher." (6a).[3]

B. The New Jersey Kosher Enforcement Regime.

The challenged regulations prohibit the sale of food "falsely represented to be kosher," N.J. ADMIN. CODE § 13:45A-21.2(a), (96a-97a), and define "kosher" food as that "prepared and maintained in *strict compliance with the laws and customs of the Orthodox Jewish religion*." § 13:45A-21.1 (95a)(emphasis added). As the New Jersey Supreme Court recognized, "the regulations refer explicitly to the 'Orthodox Jewish religion' and the 'laws and customs' of that religion to specify the standards that apply to the kosher food industry." (8a). To determine precisely what kosher dietary laws require, and to aid it in deciding how and against whom the regulations should be enforced, the New Jersey Attorney General relies on his Advisory Council on Kosher Food, which "consists of ten rabbis appointed by the Attorney General." (9a). The Chairman of this committee, currently Rabbi Yakov Dombroff, "is the Chief of the Bureau of Kosher Enforcement" within the Division of Consumer Affairs. (9a). The court below definitively held that, under New Jersey law, this state-appointed rabbinical council "shares responsibility for the enforcement of the regulations." (9a). The penalties for violating the Attorney General's and

---

[2] *See* Brief of COLPA as *Amicus Curiae* in the Superior Court of New Jersey, Appellate Division, at 5 n.3 & attached addenda. The court below expressly endorsed reliance on these and the other secondary sources entered into the record by the parties in order to ascertain the scope and nature of the doctrinal dispute over kosher dietary laws. (20a-21a).

[3] For example, KASHRUS MAGAZINE, Sept., 1990, 26-32, published a guide to "over 100 rabbinically supervised kosher supervision services world-wide, but withh[eld] endorsement of any particular service with the following disclaimer: '*Some of the [supervision services] are not relied upon by most of the kosher world. Consult your rabbi for which symbols you should use.*'" (6a)(emphasis in original).

his rabbinical council's understanding of kosher dietary doctrine include injunctions against further operation of a kosher business, N.J.S.A. § 56:8-8, civil fines, § 56:8-13, and conviction of a disorderly persons offense, § 2C:21-7.4. (8a).

C. This Litigation.

This case arose out of a dispute among ordained Orthodox Jewish authorities about kosher practices at Respondent Ran-Dav's County Kosher, an establishment run by Respondents Arthur and Nadine Weisman. Mr. Weisman is a practicing Jew who operates his store "in accord with Jewish requirements as [he] understand[s] them and as [his] supervising Rabbi directs." App.Div.App. at Aa46. Ran-Dav's is under the supervision of an ordained Orthodox rabbi, Harry Cohen, who makes unscheduled on-site inspections two or three times a week. *Id.* at Aa41. Rabbi Cohen, a retired Army chaplain with the rank of lieutenant colonel, is a former member of the Rabbinical Council of America and has served as the supervising rabbi for kosher establishments in New York since 1954. *Id.* Rabbi Cohen is of the opinion that Ran-Dav's "conscientiously observe[s] rabbinical instruction concerning the preparation and handling of kosher products." *Id.* at Aa41; *see also* 9a.

For the last decade, Rabbi Cohen, who resides in and conducts his kosher supervision duties from New York, has had a doctrinal dispute with New Jersey rabbinical authorities over the propriety of kosher supervision of a New Jersey establishment by a rabbi from outside the local Orthodox community — a dispute that was related to a falling-out a decade ago between New Jersey rabbis and New Jersey kosher establishments. N.J.S.Ct.App., Vol. II, at Da245-47. The Rabbinical Council of America (RCA) "questioned the ethics" of an "out of state" rabbi giving kosher supervision "in areas where [New Jersey] RCA men reside." *Id.* at Da248. Rabbi Cohen was formally charged with having profaned God's name by having given his endorsement to a New Jersey butcher shop which had, in another rabbinical authority's opinion, committed a breach of kosher dietary laws. *Id.* at Da250. Rabbi Cohen was expelled from the RCA on the basis of this dispute, *id.* at Da251, and notices were published in New Jersey synagogue newsletters advising exercise of "proper judgment for ads listing [Rabbi Cohen] as the certified

rabbi" for a kosher food establishment. *Id.* at Da252-53. When Rabbi Cohen unsuccessfully sought to litigate his expulsion from the RCA in the New York courts, the RCA itself averred that such "ecclesiastical" disputes were no business of the civil courts. *Id.* at Da254-56.

All three of the kosher establishments targeted for enforcement by Rabbi Dombroff and the Kosher Enforcement Bureau were under the rabbinical supervision of Rabbi Cohen. *Id.* at Da257; App.Div. App. at Aa41. The consumer fraud proceedings against Ran-Dav's and the other establishments began with a press release issued on the eve of Passover. The effect on their businesses was devastating; Ran-Dav's ultimately filed for bankruptcy in January of 1993.

After reviewing the specific kosher violations alleged in the State's complaint, Rabbi Cohen concluded in a sworn affidavit that the supposed transgressions "range from baseless to highly debatable." App.Div.App. at Aa42.

As a defense and counterclaim to the state's consumer fraud enforcement action, Ran-Dav's and the New Jersey Alliance of Kosher Caterers, which joined as a party, argued that the kosher regulations violated the Religion Clauses of the New Jersey and Federal Constitutions. The trial court directed that constitutional challenge to the Appellate Division for resolution. (4a). Therefore, as New Jersey itself points out, N.J. Br. at 2, although this case was denominated below as a facial challenge, it arose out of and was considered with the entire record generated by the actual enforcement action against Ran-Dav's County Kosher. *See also* 20a.

D. The Decision of the New Jersey Supreme Court.

The New Jersey Supreme Court sustained Ran-Dav's and the Kosher Caterers' constitutional challenge and struck the kosher regulations down under both the New Jersey and the Federal Constitutions. (3a, 10a). After a careful examination "of the record and secondary sources," the court below found that differences of opinion and disputes exist "with respect to the laws of *kashrut*," "[b]ecause of varying doctrinal interpretations, varying degrees of trust that members of some sects place in the food supervisors of

other sects, and varying 'shades of observance' undertaken by individual Jews." (20a). These disputes "are ineluctably religious in tenor and content." (20a).[4]

Despite endorsement of their kosher practices by their own ordained, Orthodox rabbis, "merchants sincerely believing that their products are kosher could nevertheless be prosecuted under the regulations if the State believes that their products do not conform to the standards of Orthodox Judaism *as the State defines and applies them*." (13a)(emphasis added). The New Jersey Supreme Court noted that although the State had waffled on this issue in the lower appellate court (12a-13a; 21a-22a), the State ultimately "abandoned its position that the regulations allow different interpretations of the kosher laws." (13a). New Jersey's highest court deemed it decisive that the "Attorney General's current understanding of the kosher regulations [as inflexible] comports with the actual text of the regulations, which refers to the kosher laws as those being in 'strict compliance' with Orthodox Jewish doctrine." (21a).[5]

---

[4] Respondent New Jersey contends that the record does not establish more than "nominal" doctrinal differences over kosher dietary requirements, and that the Orthodox kosher regulations may therefore be enforced without fear of any "'dispute over religious doctrine.'" N.J. Br. at 3. In making these assertions, New Jersey thus takes issue with the express *factual* findings of the New Jersey Supreme Court. The State offers an interpretation of the record that was flatly rejected below, and the State accordingly cites only to the *dissent* below and to the Appellate Division opinion, which has been *reversed*.

[5] The State continues to bend its purported understanding of the kosher regulations to fit its ever-changing litigation strategy. As respondent here, the State represents that the "unrefuted policy of the State is that where good faith differences exist as to a product, rather than impose religious restrictions, the State will accept those variations," N.J. Br. at 3.

First, this is a flat misrepresentation of the record and of the State's position below. As explained above in text, New Jersey expressly abandoned this position of administrative flexibility. (12a-13a; 21a-22a). The State now attempts to mislead this Court by citing only to the now-vacated opinion of the intermediate appellate court, wholly ignoring the opinion of New Jersey's highest court. N.J. Br. at 3.

Second, the State's disingenuous disclaimer that it will not enforce against kosher establishments espousing good faith religious differences of opinion is belied by the State's enforcement action in this very case. New Jersey pressed its consumer fraud prosecution even after Rabbi Cohen, Ran-Dav's ordained,

As the court below found, the regulations "'do not police the nutritional quality or sanitary purity of kosher food, but only its religious purity.'" (15a).

> [The regulatory regime] does more than require that businesses purporting to be under a certain type of rabbinical supervision are in fact under that type of supervision; it requires such establishments to adhere strictly to religious kosher standards in the conduct of their business and authorizes the State to monitor adherence to those standards. As a result, Jewish law prescribing religious ritual and practice is inextricably intertwined with the secular law of the State. Further, the State itself takes on the traditional religious supervisory role, thereby partially supplanting the Jewish organizations and institutions that historically have stood as final judges of religious matters.

(15a). Therefore, "[t]he conclusion is inescapable that if a merchant did not adhere to Jewish Orthodoxy, as perceived by the Bureau of Enforcement, and the State legally challenged the merchant's right to sell his or her products as 'kosher,' a court would have to resolve whether the merchant's view of *kashrut* diverged from the State's definition of Jewish Orthodoxy. It is difficult to envision a civil controversy stamped more indelibly with religious doctrine." (22a).

Orthodox, supervising rabbi, stated that the supposed kosher violations identified by Rabbi Dombroff and the rabbis of the Kosher Enforcement Bureau were either baseless or highly debatable. This religious, doctrinal dispute between Orthodox Jewish authorities — which the State candidly described early in the litigation as a difference of "opinion," App.Div.App. at Aa138 — did not deter the State from prosecuting Ran-Dav's and running it out of business.

Third, and most importantly, New Jersey's highest court has now authoritatively interpreted the regulations as requiring non-discretionary "'strict compliance' with Orthodox Jewish doctrine" (21a), and neither the State nor Petitioner can challenge that binding determination in this Court.

Finally, we note that the State's demonstrated inability to stick with a position on this issue from one brief or oral argument to the next may help explain why the State dithered about for five months and then ultimately chose *not* to seek review of the decision below.

In any event, the decision below rejected, as wholly missing the point, the argument that alleged unanimity on what kosher law requires would eliminate government advancement of, and entanglement with, religion. As the court below observed, the "laws of *kashrut* are intrinsically religious, whether they are ambiguous or not and whether they are disputed or not. Religious doctrines cannot be recast as secular principles simply because they are clear." (22a) (citing *Lee v. Weisman*, 112 S.Ct. 2649 (1992)).

The New Jersey Supreme Court invalidated the regulations under both the New Jersey and Federal Constitutions because "[t]he regulations authorize a consumer fraud action founded on the fact that the product itself was prepared or maintained in ritually incorrect fashion, in violation of the laws of *kashrut*. In that respect, the regulations are . . . 'quintessentially and unavoidably religious in character.' *The regulations have been designed to assure truth in marketing, but the truths being marketed are, in essence, religious truths.*" (28a)(emphasis added).

The court below recognized that "false promotion of non-kosher foods harms a variety of consumers," including observant Jews who might be induced unwittingly to break the laws of their faith, adherents of other faiths who buy kosher in order to observe their own tenets forbidding consumption of pork, and those who may deem kosher meat superior because it is prepared under especially close scrutiny. (7a). The court further recognized that the state may regulate the advertising and labeling of kosher food in order to address these problems, and may forbid fraud in representation of religious supervision. "The key to such a regulatory approach would be . . . to require those who advertise food products as 'kosher' to disclose the basis on which the use of that characterization rests. Many kosher food purveyors would comply by imprinting the symbol of one of the recognized private agencies that supervise kosher compliance (*e.g.*, "U" for the Union of Orthodox Jewish Congregations of America). Other kosher establishments could comply with a disclosure requirement by indicating other forms of rabbinical supervision." (29a).

Under this regime, consumers could identify and buy from those kosher establishments certified by the particular religious authorities

whom those consumers follow, and eschew patronage of establishments supervised by rabbis or organizations which those consumers and their religious guides deem suspect or unorthodox. Just as the state may bar the promotion of products as having been endorsed by a particular consumer magazine or tested by a particular laboratory when they have not in fact been so endorsed or tested, so the state may bar the promotion of products as having been prepared under the supervision of a particular rabbi or rabbinical organization when they have not in fact been so prepared. (30a).

The New Jersey Supreme Court remanded to the trial court to dismiss the consumer fraud complaint against Ran-Dav's, and also, pursuant to an established state procedure, remanded directly to the Division of Consumer Affairs for the formulation of new kosher regulations consistent with its opinion. (30a).

The State obtained a 60-day extension of time within which to file a petition in this Court, but after five months of consideration it decided not to seek a writ of certiorari. The State's consumer fraud complaint against Ran-Dav's has been duly dismissed with prejudice. State compliance with the remand to the Division of Consumer Affairs has also already transpired. The State of New Jersey informs us in its brief that the Attorney General's staff "is completing the draft regulations and anticipates publishing the proposed regulations shortly." N.J. Br. at 5. A bill introduced in the New Jersey Legislature, Senate No. 1318, would essentially enact the kosher regime recommended by the New Jersey Supreme Court.

Certiorari has been sought in this Court *only* by the National Jewish Commission on Law and Public Affairs (COLPA), which appeared as an *amicus curiae* and ultimately as a party-intervenor in the New Jersey courts. COLPA's petition names New Jersey and the other State parties as respondents. New Jersey has filed no cross-petition, has made no appearance as a petitioner, and has not invoked the jurisdiction of this Court.

REASONS FOR DENYING THE WRIT

I. PETITIONER HAS NO STANDING UNDER ARTICLE III TO SEEK REVIEW OF THE DECISION BELOW.

This case is controlled by *Diamond v. Charles*, 476 U.S. 54 (1986). There, the State of Illinois, like the State of New Jersey here, chose not to seek review of a decision invalidating a state law on constitutional grounds. *Id.* at 56. Review was sought in that case, as it has been here, only by a private party that had intervened in the lower court. *Id.* at 57. Illinois was named as an appellee, just as New Jersey has here been named as a respondent. *Id.* at 61. Illinois filed a document with this Court stating that although it had not appealed the decision against it, the State's "interest in this proceeding" was "essentially co-terminous with the position on the issue set forth by the [intervenor/]appellant." *Id.* Here New Jersey, after taking five months to weigh the decision to seek certiorari and ultimately deciding *not* to, has filed a brief as respondent, supporting the petition. This brief is indistinguishable from the document filed by Illinois in *Diamond*, for in each case the state made no attempt to invoke the jurisdiction of this Court as petitioner or appellant.

As this Court held in *Diamond*, "status as a 'party' does not equate with status as an appellant. . . . By not appealing the judgment below, the State indicated its acceptance of that decision, and its lack of interest in defending its own statute. The State's general interest may be adverse to the interests of the appellees, but its failure to invoke our jurisdiction leaves the Court without a 'case' or 'controversy' between appellees and the State of Illinois." *Id.* at 63-64. *United States v. Providence Journal Co.*, 485 U.S. 693 (1988), involved a court-appointed special federal prosecutor's unsuccessful attempt to invoke this Court's jurisdiction after the United States, through the Solicitor General, declined to seek a writ of certiorari. The fact that the United States had not itself sought certiorari mandated the conclusion that this Court lacked jurisdiction: "We dismiss the writ even though the United States eventually expressed its 'interest' in the litigation and the Solicitor General

filed a brief for the United States as *amicus curiae* in support of the petition taken by the special prosecutor." *Id.* at 699 n.5.[6] A show of solidarity with or support for a former litigation ally, whatever form it may take, is not, in jurisdictional terms, a substitute for actually seeking review by filing a petition for a writ of certiorari.

The fact that Petitioner COLPA was granted "party-intervenor" status under state law by the New Jersey Supreme Court has no bearing on whether COLPA has standing to challenge the decision below in this Court. States are of course free to manage their own judicial procedures without respect to Article III of the Federal Constitution, and New Jersey's "rules of standing are more liberal than the federal rules." *Right to Choose v. Byrne*, 91 N.J. 287, 313 (1982) ("any slight additional interest is sufficient to afford standing to private individuals to raise issues of great public interest"). But "an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Diamond v. Charles*, 476 U.S. at 68. COLPA's "ability to 'piggyback' on the State's undoubted standing exists only if the State is in fact an appellant before the Court; in the absence of the State in that capacity, there is no case for [the intervenor] to join." *Id.* at 64.

The "core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992).

> First, the [party] must have suffered an "injury in fact" — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of

---

[6] *See also Karcher v. May*, 484 U.S. 72, 83 (1987) ("The controversy ended when the losing party — the New Jersey Legislature — declined to pursue its appeal."); *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986) (individual dissenting member of school board lacked standing to appeal after school board voted not to appeal); *see id.* at 549 (Marshall, J., concurring) (controversy ended when School Board lost below and failed to appeal).

> — the injury has to be "fairly . . . trace[able] to the challenged action of the [other party], and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. COLPA, as the party invoking this Court's jurisdiction, "bears the burden of establishing these elements." *Id.* Proof is required, because these "are not mere pleading requirements." *Id.*

COLPA must show that it has "'personally suffered some actual or threatened injury as a result of the putatively illegal conduct' of the other party." *Diamond v. Charles*, 476 U.S. at 62. "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." *Id.* Although COLPA fails to identify in its petition just what sort of organization it is, when it appeared in the New Jersey courts below it described itself as "an organization of volunteer *lawyers and social scientists* that advocates the position of the Orthodox Jewish Community on legal issues." Brief of COLPA as *Amicus Curiae* in the Superior Court of New Jersey, Appellate Division, at 1 (emphasis added). While their zeal may be commendable, the status of COLPA's members is at best that of bystanders.

It therefore comes as no surprise that COLPA has not even alleged, let alone adduced facts to prove, any actual or imminent injury to itself or its members. *See Lujan*, 112 S.Ct. at 2138; *Diamond*, 476 U.S. at 65. It is a "'first principle of federal jurisdiction,' appl[icable] 'whether the case is at the trial stage or the appellate stage,'" that the "necessary factual predicate" for standing *must be in the record and "may not be gleaned from the briefs and arguments themselves."* *Bender v. Williamsport*, 475 U.S. at 547 (emphasis added). COLPA has never shown that its members reside in New Jersey and observe kosher dietary laws as promulgated by the state, let alone that they have a grievance against Ran-Dav's or any other kosher establishment. On the record in this case, COLPA's members, as "lawyers and social scientists," can at most complain that the decision below is "simply a setback to the organization's abstract social interests." *Havens Realty Corp.*

v. Coleman, 455 U.S. 363, 379 (1982).[7] The only interest COLPA can present is "simply the expression of a desire" that the now-invalidated and soon-to-be replaced New Jersey kosher regulations be resurrected and enforced. *Diamond*, 476 U.S. at 66. But "Article III requires more than a desire to vindicate value interests. It requires an 'injury in fact' that distinguishes 'a person with a direct stake in the outcome of a litigation — even though small — from a person with a mere interest in the problem.'" *Id.* at 66-67. Such an "'abstract concern . . . does not substitute for the concrete injury required by Art. III.'" *Id.* at 67. *See id.* at 75 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring) ("abstract interests" and an interest that is "nothing more than a desire" are insufficient).

This Court has "consistently held that a [party] raising only a generally available grievance about government — claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large — does not state an Article III case or controversy." *Lujan*, 112 S.Ct. at 2143. There is nothing in the New Jersey kosher regulations to suggest that the state meant "to confer legally protectible interests on particular beneficiaries of that law." *Diamond*, 476 U.S. at 76 (O'Connor, J., concurring). New Jersey enacted a "law which it would itself enforce, thereby making violators liable to the public as a whole, not to those members of the public who might in some degree benefit from the law's enactment or enforcement." *Id.*

In this respect COLPA's standing is also fatally flawed as to the Article III requirement of redressibility. *See Bender*, 475 U.S. at 542. Even if the New Jersey regime were revived by this Court, neither COLPA nor anyone else "could compel the State to enforce it against [respondents] because 'a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.'" *Diamond*, 476 U.S. at 64 (quoting *Linda R. S. v. Richard D.*,

---

[7] An association's claim of standing requires "the same inquiry as in the case of an individual," *Harris v. McRae*, 455 U.S. 363, 378 (1980), and the organization's standing, if any, derives from that of its members. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

410 U.S. 614, 619 (1973)). Here, as in *Diamond*, the "concerns for state autonomy that deny private individuals the right to compel a State to enforce its laws apply with even greater force to an attempt by a private individual to compel a State to create and retain the legal framework within which individual enforcement decisions are made." 476 U.S. at 65. COLPA's "attempt to maintain the litigation is, then, simply an effort to compel the State to enact a code in accord with [COLPA's] interests." *Id.*

None of this is changed by the decision of New Jersey, as respondent here, to file a brief supporting COLPA's petition. For the *jurisdictionally dispositive fact* remains that the State did not itself invoke the jurisdiction of this Court. *Providence Journal*, 485 U.S. at 699 n.5; *Diamond v. Charles*, 476 U.S. at 63-64. As the Court observed in *Diamond*, a "State's reasons for abandoning" a suit, even when the state files a document supporting an intervenor's appeal, may sometimes involve intervening legislative or administrative amendment of the challenged rules. *Id.* at 63 n.16. As the State itself notes, the State's Division of Consumer Affairs, in accord with the New Jersey Supreme Court's specific remand to that agency, has already engaged in "expeditious reformulation of the regulations consistent with [the] opinion" and "anticipates publishing the proposed regulations shortly." N.J. Br. at 5. Since the State did not seek certiorari, did not seek any stay of the decision below, and has already begun implementing the new regime pursuant to the remand, it appears that the kosher regulatory regime that COLPA would have this Court resurrect no longer exists. Despite its belated and quixotic appearance as a respondent here, New Jersey has already moved on and COLPA's petition has been effectively mooted.

The "decision to seek review must be placed 'in the hands of those who have a direct stake in the outcome.'" *Diamond*, 476 U.S. at 62. Here those hands belong to New Jersey, which received an extra 60 days in which to ponder its course. Five months of consideration led it to the decision not to seek review in this case. As for COLPA, the decision to seek review "is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Id.* at 62. The Petitioner has no standing under Article III to seek review of the

decision below, and therefore this Court has no jurisdiction because no case or controversy exists.

II. THE DECISION BELOW RESTS ON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND.

Even if the Petitioner had standing, this case would remain an unsound vehicle for considering any federal Establishment Clause issue because the reliance by the court below on the New Jersey Constitution would render advisory any opinion issued by this Court. Article I, ¶ 4 of the New Jersey Constitution provides that "[t]here shall be no establishment of one religious sect in preference to another." (10a). The New Jersey Supreme Court repeatedly invoked this provision, in addition to the federal Establishment Clause, in striking down the regulations (3a, 4a, 10a, 11a, 19a, 29a), and expressly held that "the kosher regulations violate the Establishment Clauses of the federal *and state* constitutions." (4a)(emphasis added). "[I]f a state court decides that a particular state action violates *both* federal and state law, the final state court judgment is not reviewable by the Supreme Court." Justice O'Connor, *Our Judicial Federalism*, 35 CASE WES. L. REV. 1, 5-6 (1984) (original emphasis). *See, e.g., Henry v. Mississippi*, 379 U.S. 443 (1965).

To be sure, the New Jersey Supreme Court found federal decisions, like those from other jurisdictions, instructive. (*See, e.g.*, 23a) (citing New York and federal decisions). But this does not diminish either the independence or the adequacy of the state law ground for the decision below. "If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). That plain statement was provided when the court below expressly noted that its "interpretation of the state constitutional standard *is informed* by an understanding of federal constitutional doctrine concerning the establishment of religion." (11a)(emphasis

added). *See Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 556 (1940) (if the "state court employed the decisions under the federal constitution merely as persuasive authorities for its independent interpretation of the state constitution . . . we would have no jurisdiction to review").

Article I, ¶ 4 of the New Jersey Constitution does not merely mimic the federal Establishment Clause. Petitioner makes much of the fact, noted by the court below, that, because it "contains no reference to the 'free exercise' of religion," New Jersey's Religion Clause is in one respect "'less pervasive, literally, than the Federal provision,' and [the New Jersey Supreme Court] has not been impelled to interpret the state constitution more broadly than the federal constitution . . . ." (11a)(*quoted in* Pet. at 11). But this passing comment has no bearing on this particular case, as the New Jersey precedents cited by the court below — but ignored by Petitioner — make plain. (11a).

The New Jersey Establishment Clause is "less pervasive, literally," than its federal counterpart because the former bars any "establishment of one religious sect *in preference* to another," N.J.Const., Art. I, ¶ 4 (emphasis added), while the latter dictates that "Congress shall make no law *respecting* an establishment of religion." U.S. Const., Amend. I (emphasis added). The New Jersey Supreme Court identified this difference in emphasis in *Marsa v. Wernik*, 86 N.J. 232, *cert. denied*, 454 U.S. 958 (1981), *cited below* at 11a, and explained that the court has, "therefore, generally limited [its] discussion to the federal provision as interpreted by the United States Supreme Court *in situations where under the particular facts no one religious sect was assertedly preferred over other sects*." 86 N.J. at 239 n. 2 (emphasis added). *See also Resnik v. E. Brunswick Tp. Bd. of Educ.*, 77 N.J. 88, 104 (1978) (Art. I, ¶ 4, applies only when "one religious sect was preferred over other sects")(*cited below* at 11a).

If, however, a particular sect or denomination has allegedly been given preferential treatment, then the challenged New Jersey government action must establish "compelling criteria to meet the exacting judicial scrutiny required under the New Jersey Constitution to ensure that no religious sect dominates and that no sect is

disfavored." *Marsa v. Wernik*, 86 N.J. at 240 n.2. The New Jersey Supreme Court explained that "[s]uch scrutiny may very well be different from" and "more exacting" than that accorded under the Federal Constitution, *id.*, and went on to delineate additional analytical and doctrinal distinctions between the state and federal Establishment Clauses when a religious preference is at issue. *Id. See also Tudor v. Bd. of Educ.*, 14 N.J. 31, 41-44 (1953)(Vanderbilt, C.J.)(N.J. Const. by its very terms, not merely by interpretation, prohibits *any* religious preference)(*cited below* at 10a-11a).[8]

The New Jersey Supreme Court's basis for finding a religious preference forbidden by state law in this case was further bound up with other state law doctrines that are beyond the bailiwick of this Court. For example, the court below held that, under state law, the State's action in appointing an Orthodox rabbi to head the State Bureau of Kosher enforcement, and its decision to staff the Attorney General's Kosher Advisory Council with Orthodox rabbis, were administrative acts relevant to the court's interpretation of the kosher regulatory regime, and supportive of the court's ruling on the preferential "sectarian nature of the regulations." (17a-18a) (citing *Cedar Cove, Inc. v. Stanzione*, 122 N.J. 202, 212 (1991), and *Peper v. Princeton University*, 77 N.J. 55, 69-71 (1976)).

Although the opinion below made reference to the test formulated by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *see* 13a-14a, it did so because New Jersey law "is informed by" an understanding of federal law (11a), and because that decision provides a useful analytical framework for applying New Jersey's (and other jurisdictions') precedents assessing church-state enactments, *not* because *Lemon* or any other federal precedent governs

---

[8] This case is thus easily distinguished from those instances where this Court has found jurisdiction to review a state court judgment because the state court opinion stated that the state right was identical to the federal right, *see Pennsylvania v. Muniz*, 496 U.S. 582, 588 n.4 (1990); *ASARCO v. Kadish*, 490 U.S. 605, 624-25 (1989); *Maryland v. Garrison*, 480 U.S. 79, 83-84 (1987), or because the state precedents relied upon by the state court did not interpret the state law provision differently from the cognate federal guarantee, *see Montana v. Hall*, 481 U.S. 400 (1987)(per curiam); *New York v. P.J. Video*, 475 U.S. 868, 872 n.4 (1986); *Delaware v. Van Ardsall*, 475 U.S. 673, 677 (1986); *California v. Carney*, 471 U.S. 386, 389 n.1 (1985); *Ohio v. Johnson*, 467 U.S. 493, 497 n.7 (1984).

the interpretation of New Jersey's distinct ban on sectarian preferences. Thus, in *Right to Choose v. Byrne*, 91 N.J. 287 (1982), *cited below* at 11a, the New Jersey Supreme Court considered a challenge to a state law based on the *New Jersey* Establishment Clause, even though the court recognized that the plaintiff's parallel challenge under the *Federal* Establishment Clause was foreclosed by a prior decision of this Court. *Id.* at 312-13, 316 (discussing *Harris v. McRae*, 448 U.S. 297 (1980)). Denial of federal constitutional relief did not resolve the state law issue, even though analysis of the claim under Art. I, ¶ 4 of the New Jersey Constitution proceeded under the analytical framework of the test set forth in *Lemon* and other decisions of this Court. *See* 91 N.J. at 313. The simple reason for this is that the New Jersey Establishment Clause is a distinct constitutional guarantee that does not merely parrot the federal guarantee and that is not governed by federal precedent.

Similarly, in this case the New Jersey Supreme Court, while employing the framework of the three-part test familiar to this Court, relied heavily on New Jersey as well as federal precedents in interpreting Art I, ¶ 4 as invalidating the kosher regulations. Indeed, the court below relied exclusively on New Jersey precedents when it held that the New Jersey courts may not decide "disputes involv[ing] interpretations of religious doctrine itself." (23a) (citing *Elmora Hebrew Center v. Fishman*, 125 N.J. 404, 420 (1991) ("only a religious authority may be able to decide the scope of duties of an 'orthodox Rabbi'"); *Chavis v. Rowe*, 93 N.J. 108, 111-12 (1983) ("plaintiffs would have us perform a task better left to exegetes. . . . Such hermeneutics are beyond this Court's realm."); *Alicea v. New Brunswick Theological Seminary*, 244 N.J.Super. 119 (App.Div. 1990) (the judicial inquiry into church customs and practices sought by the plaintiff "would constitute an 'establishment of religion with a vengeance'"), *aff'd on other grounds*, 128 N.J. 303 (1992). "New Jersey cases have long held that civil courts lack jurisdiction over spiritual matters and the administration of church affairs that do not affect the civil or property rights of individuals." *Chavis*, 93 N.J. at 109 (citing a line of authority that began in 1894, half a century before the federal Establishment Clause was held applicable to the states). In particular, the New Jersey courts have long disclaimed "the right, authority or jurisdiction to declare or to

find what is kosher and what is non-kosher . . . ." *Cabinet v. Shapiro*, 17 N.J.Super. 540, 547 (Law Div. 1952).[9]

Accordingly, the decision below rests upon an adequate and independent state law ground and is therefore wholly inappropriate for review by this Court. *Michigan v. Long*, 463 U.S. at 1040-42. Finally, Respondents note that the need to maintain uniformity in federal law, which usually augers in favor of certiorari when a state court has deviated from established federal doctrine, *see id.* at 1040, is in any event not implicated on the face of the Petition. As the following sections explain, Petitioner does not even assert, much less show, that the state court decision below misapplied existing federal doctrine, *see* Pet. at 12-14; instead, Petitioner openly seeks a change in federal law under the Establishment Clause. *See* Pet. at 14. Even if the enormous jurisdictional barriers could be overcome, this case would remain a singularly unworthy vehicle for venturing forth on the trip that Petitioner wishes to take.

---

[9] This established corpus of state authority distinguishes this case from those instances in which this Court took jurisdiction, despite an asserted independent state law ground, because although the state court had relied on state precedents, those precedents were cited only for holdings on *federal* law. *See Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11-12 n.5 (1990); *Michigan v. Chesternut*, 486 U.S. 567, 570 (1988); *Oliver v. United States*, 466 U.S. 170, 175 n.5 (1984).

III. THE PETITION FAILS TO IDENTIFY ANY ISSUE OF FEDERAL LAW ON WHICH THE DECISION BELOW IS IN ERROR OR IN CONFLICT WITH ANY DECISION OF ANY FEDERAL COURT, AND THE ASSERTED "CONFLICT AMONG STATE COURTS" IS NOT ONLY A SHAM BUT IS IN ANY EVENT BEYOND THE JURISDICTION OF THIS COURT.

Petitioner offers no argument that the decision below misapplied this Court's Establishment Clause jurisprudence. The disagreement with the decision of the New Jersey Supreme Court seems to be based not on its application of the governing law, but rather on its resolution of the facts surrounding enforcement of the kosher consumer law in this case.[10] Petitioner's only criticism of the New Jersey Supreme Court's analysis is the implicit contention that the Establishment Clause is entirely inapplicable to this case because no one "is forced" to prepare and sell kosher food: if a vendor chooses to represent that his wares were prepared in accord with the ancient dietary doctrine of *kashrut*, the New Jersey regulations demand only that the vendor's application of those religious dietary laws follow the religious teachings favored by the state's advisory panel of rabbis. Pet. at 10.

Petitioner has missed the point. The fact that devotion to any given religious code or faith is voluntary does not empower the state to enact its own particular understanding of that code into civil law and to enforce compliance with it, under pain of prosecution, by those whose souls hearken to the call of that faith. Arthur Weisman, a practicing Jew and the proprietor of Ran-Dav's County Kosher, prepares his kosher ("ritually correct") food — consumed by Orthodox Jews in the dietary practice of *kashrut* in order to attain

---

[10] Should the Court choose to consider the Brief *Amici Curiae* of Rabbinical Associations, it will discover that the would-be *amici* likewise openly predicate their argument for certiorari on an alleged need to correct supposed "factual errors" made by the New Jersey Supreme Court. *See id.* at 4, 5.

kedusha ("holiness") — in accord with the millennia-old rules of *kashrut* as he understands them and as his ordained Orthodox rabbi directs. The state may require that Mr. Weisman and all other kosher vendors disclose to the consuming public the basis for the representation that their food is kosher and the identity and religious affiliation of their supervising rabbis, if any. In this way, consumers may judge for themselves, perhaps in consultation with their own rabbis, whether that food meets the consumers' own religious dietary standards. But the state may *not*, as COLPA contends, force Mr. Weisman or any other Orthodox Jew to observe the particular version of the rules of *kashrut* that the state has chosen to enact into law, and which the state interprets and enforces with the aid of state-appointed rabbinical authorities.

Instead of urging certiorari to review an alleged misapplication of federal constitutional law, or to resolve some supposed conflict between the decision below and some federal precedent, COLPA asks this Court to resolve what it represents as a "Conflict Among State Courts." Pet. 12. Petitioner seems to be unaware that this Court is a tribunal of limited jurisdiction concerned exclusively with *federal* law.

The first authority adduced is *Barghout v. Mayor & City Council*, 325 Md. 311, 600 A.2d 841 (1992), in which Maryland's highest court upheld a municipal ordinance against a challenge based on a provision of the Maryland Constitution. The *Barghout* court expressly noted that it was not considering any issue of federal constitutional law, 600 A.2d at 849, and that the Maryland Constitution did not contain any provision similar to the Federal Establishment Clause, *id.* at 848-49.[11] Therefore, the most that can be said about this "conflict" is that the Maryland Constitution is different

---

[11] *Barghout* is further distinguished from this case by the fact, which COLPA itself points out, Pet. at 12, that a vendor does not violate the law if he has a good faith belief that his food complies with kosher requirements. 600 A.2d at 842. Here Arthur Weisman of Ran-Dav's County Kosher was prosecuted by New Jersey because his sincere adherence to the laws of *kashrut* as taught by his supervising rabbi did not comport with the different understanding of kosher requirements taught by the state's appointed rabbis.

from the New Jersey Constitution, which is an issue wholly beyond the interest, competence and jurisdiction of this Court.

COLPA next relies on *Erlich v. Municipal Court*, 55 Cal.2d 553, 360 P.2d 334 (1961), even though COLPA itself admits that the case did not involve the Establishment Clause. Pet. 20.[12] Finally, COLPA invokes this Court's decision in *Hygrade Provision Co. v. Sherman*, 266 U.S. 497 (1925), as authority for the proposition that "orthodox Hebrew religious requirements" are "sufficiently definite to withstand constitutional challenge." Pet. at 13. Petitioner fails to mention that the "constitutional challenge" in that case involved the Due Process Clause rather than the Establishment Clause, and is therefore of no relevance here. Perhaps Petitioner is unaware that the Establishment Clause was not even held applicable to the states through the Fourteenth Amendment until 20 years after *Hygrade* was decided. *See Everson v. Bd. of Education*, 330 U.S. 1, 15-16 (1947).[13]

---

[12] A more modern California decision that COLPA does not cite agrees with the New Jersey Supreme Court that "the determination of whether [a vendor's] meat is kosher is an ecclesiastical question":

> Food which is kosher . . . is food of the type which is permitted and which has been prepared in conformity with Jewish law . . . . As that law is open to interpretation, rabbinic authorities may differ on the question of whether preparation of specific meat conforms to the pertinent law . . . . [I]f rabbinic authorities' interpretation of Judaic law render disparate findings concerning the status of meat purported to be kosher, the court lacks jurisdiction to settle the dispute.

Korn v. Rabbinical Council of California, 148 Cal.App.3d 491, 195 Cal.Rptr. 910, 913-15 (Cal.Ct.App. 1983). *See also United Kosher Butchers Ass'n v. Assoc. Synagogues of Greater Boston*, 349 Mass. 595, 211 N.E.2d 332 (1965)(if the court were to consider plaintiffs' cause of action, it "would inevitably be faced with such questions as who has the authority to enforce Kashruth in [this region], what are the criteria for determining which foods are kosher, and what procedures must the body in charge of Kashruth follow. All of these questions are determined only by reference to Jewish law, a domain into which the courts will not venture.").

[13] COLPA's final citation is to *Sossin Systems, Inc. v. City of Miami Beach*, 262 So.2d 28 (Fla.Dist.Ct.App. 1972), in which a state intermediate appellate court simply denied a petition for certiorari to review a municipal court conviction for having sold non-kosher food as kosher "with intent to defraud." *Id.* at 29. In the single brief paragraph of dicta devoted to the Establishment Clause, the court merely asserted that such laws had previously been upheld under that clause, erroneously relying on *Hygrade*. 262 So.2d at 30.

COLPA's invocation of these cases and this supposed "conflict among state courts" as a basis for certiorari is frivolous and constitutes a waste of this Court's time.

IV. THE PETITIONER OFFERS NO REASON FOR THIS COURT TO RECONSIDER ITS ESTABLISHMENT CLAUSE JURISPRUDENCE, AND THIS CASE WOULD IN ANY EVENT BE AN UNSOUND VEHICLE FOR ANY SUCH UNDERTAKING.

COLPA notes that there are two cases pending in this Court that may involve application of the test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See Zobrest v. Catalina Foothills School District*, No. 92-94; *Lamb's Chapel v. Center Moriches Union Free School District*, No. 91-2024. Pet. at 14. But Petitioner offers not one word explaining how the resolution of those cases involving the special context of religion in schools would affect the decision below. Neither case presents any issue of state enforcement of religious orthodoxy, state court adjudication of doctrinal disputes among religious authorities, or the delegation to religious leaders of a formal role in determining where and against whom the state's laws will be enforced.

Whatever disagreement there might be among the Members of this Court with respect to the *Lemon* test has no bearing on the decision below, for this case does not involve the more difficult problem of neutral, nonsectarian state accommodation of all religious beliefs. What is at issue here is state intervention into an ancient and continuing doctrinal debate over the Orthodox Jewish dietary laws of *kashrut*, involving state legislative enactment of one interpretation of those laws and state civil and criminal enforcement against food vendors who adhere to a different understanding of *kashrut* taught by their own Orthodox rabbis. The Establishment Clause principles necessary to resolve these issues are not in flux.

Laws that "grant[] a denominational preference," such as the kosher regulations at issue here, are subject to "strict scrutiny" even when the state's interest is the important one of protecting citizens

from fraud. *Larson v. Valente*, 456 U.S. 228, 246-47 (1982). Attempts by the state to enforce a commercial code that enacts one interpretation of orthodoxy raise a "substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs." *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976). *See also Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 448 (1969).

The kosher enforcement regime "enmesh[es]" religious leaders "in the exercise of substantial government powers contrary to this Court's consistent interpretation of the Establishment Clause; 'the objective is to prevent, as far as possible, the intrusion of either Church or State into the precincts of the other.'" *Larkin v. Grendel's Den*, 459 U.S. 116, 126 (1982). Although "[s]ome limited and incidental entanglement between church and state is inevitable in a complex modern society," *id.* at 123, New Jersey's enactment and enforcement of one interpretation of Orthodox dietary laws is neither "limited" nor "incidental." It amounts to "'a fusion of governmental and religious functions'" in the area of religious dietary doctrine. *Id.* at 126. Such "direct cooperation between state officials and religious ministers" is flatly forbidden by the First Amendment, *McGowan v. Maryland*, 366 U.S. 420, 452 (1961), which prohibits a State from employing religious authorities as an adjunct of the civil law enforcement regime "to perform the function of interpreting and applying state standards." *Presbyterian Church*, 393 U.S. at 451. The constitutional vice is compounded by the fact that New Jersey's courts, in the course of enforcing the regulations and deciding which religious authority's understanding of *kashrut* is truly orthodox, would inevitably become embroiled — as the lower courts were here, in dismissing Rabbi Cohen's teachings — in deciding ecclesiastical questions that are wholly inappropriate for resolution by civil authorities. *See, e.g., Presbyterian Church*, 393 U.S. at 440; *Serbian Orthodox*, 426 U.S. at 709.

The kosher regulations were also beyond the constitutional pale because this intermingling of state power and religious doctrine created "the danger of political fragmentation and divisiveness on religious lines." *Grendel's Den*, 459 U.S. at 127. The record shows that the State's enforcement of the regulations under Rabbi

Dombroff's direction in this case provoked precisely the sort of turmoil identified by this Court in *Grendel's Den*. *See* App.Div. App. at Asa57, Asa72, Asa73. In that case, where the Court struck down a law delegating a role in liquor licensing to local churches, this Court noted the risk that this power could be "employed for specifically religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith." 459 U.S. at 125. Even greater opportunities for abuse are manifest in New Jersey's regime for enforcing one view of Orthodox doctrine as civil law. Indeed, the record contains disturbing indications — unrebutted by Petitioner — that the State's Passover raid (at Rabbi Dombroff's direction) on kosher establishments supervised by Rabbi Cohen was tainted by and a product of a long-standing doctrinal dispute between Rabbi Cohen of New York and some rabbinical authorities in New Jersey. *See supra* pages 3-4.

Just last Term, the opinions in *Lee v. Weisman*, 112 S.Ct. 2649 (1992), confirmed that there is continued unanimity on the central proposition that the state must not insinuate itself into sectarian "religious debate," because "[a] state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Id.* at 2657, 2658 (Kennedy, J., for the Court). "Government may neither promote nor affiliate itself with any religious doctrine or organization, nor may it obtrude itself in the internal affairs of any religious institution." *Id.* at 2661-62 (Blackmun, J., joined by Stevens and O'Connor, JJ., concurring). This reflects the "Madisonian concern that secular and religious authorities must not interfere with each other's respective spheres of choice and influence." *Id.* at 2663 n.3 (Blackmun, J., joined by Stevens and O'Connor, JJ., concurring). By requiring the state courts to arbitrate between competing understandings of just what is kosher under Jewish law, the New Jersey regulatory regime "invite[s] the courts to engage in comparative theology. I can hardly imagine a subject less amenable to the competence of the . . . judiciary, or more deliberately to be avoided where possible." *Id.* at 2671 (Souter, J., joined by Stevens and O'Connor, JJ., concurring).

Although they differed with the Court on other issues, the dissenters in *Weisman* agreed that the Establishment Clause "ruled

out of order government-sponsored endorsement of religion — even when no legal coercion is present . . . — where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world, are known to differ." *Id.* at 2683-84 (Scalia, J., joined by Rehnquist, C.J., and White and Thomas, JJ., dissenting). The state may not "lend its power to one or the other side in controversies over religious authority or dogma." *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872, 877 (1990)(Scalia, J., for the Court). Yet that is precisely what the New Jersey kosher regulatory regime did here.

Thus, the nuances of the *Lemon* test and the controversy surrounding them are simply not implicated by the decision below, since the outcome was in any event dictated by Establishment Clause principles — on which this Court is unanimous — that forbid state involvement in sectarian religious debates and the use of coercive state power to promote religious doctrine. The decision below presents no occasion to choose between the *Lemon* test and any alternative "coercion" theory of the Establishment Clause; therefore, there is no reason for this Court to grant a writ of certiorari nor even to hold the petition pending the decision of any other case.

Finally, we note that the caption of this case itself dramatically demonstrates the religious entanglement created by the New Jersey kosher regulations. Petitioner COLPA, a sectarian organization of lawyers and social scientists dedicated to promoting the interests of the Orthodox Jewish Community, seeks relief against the State of New Jersey, respondent, which has abandoned its legal defense of the invalidated regulations, is already complying with the lower court's mandate, and will be proposing different rules any day now. The Petition thus asks this Court to resurrect the old regulations at the behest of private religious interests and to foist them upon a State that no longer wants them.[14] It is difficult to imagine a case

---

[14] The appearance of a rabbinical association as a would-be *amicus* underscores this attempt by religious groups to have this Court force a sovereign state to enforce and police that group's religious doctrines.

in which the legitimate interests of a secular state and a sectarian religious group diverge more sharply.

Furthermore, there is no argument from the Petitioner or anyone else that the new draft regulations, or the kosher bill pending in the New Jersey Senate, or the regulatory approach outlined by the New Jersey Supreme Court below will be inadequate to protect kosher consumers from fraud. Nor is there anything in the record that would support such an argument. Therefore, the *only* rationale for reinstituting the particular regulations that New Jersey has abandoned is to promote the agenda of certain private religious organizations by having the State enforce the particular interpretation of Orthodox dietary laws that those organizations advocate. That is a job for religious exegetes, not civil authorities. When it comes to interpreting, applying, and living by the ancient religious laws of *kashrut*, Ran-Dav's, the Weismans, and the New Jersey Alliance of Kosher Caterers answer not to the State of New Jersey, but to their own faith, to their own rabbis, and to God — who, under both the New Jersey and Federal Constitutions, is in this realm of conscience a truly Higher Authority.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

BRIAN STUART KOUKOUTCHOS
Counsel of Record
485 Concord Avenue
Lexington, Massachusetts 02173
(617) 861-6001

ERIC L. CHASE
GENEVIEVE K. LAROBARDIER
HANNOCH WEISMAN
4 Becker Farm Road
Roseland, NJ 07068
(201) 535-5300
Attorneys for Respondent
New Jersey Alliance
of Kosher Caterers

RONALD K. CHEN
AMERICAN CIVIL LIBERTIES
UNION OF NEW JERSEY
Rutgers Law School
15 Washington Street
Newark, NJ 07102
(201) 648-5160
Of Counsel

February 3, 1993